JD–44–08
Carolina, PR

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

IVYPORT LOGISTICAL SERVICES, INC.

and Case 24–CA–10794

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO

Jose Luis Ortiz, Esq., *for the General Counsel*
Yolanda Diaz-Rivera, Esq., *for Respondent*

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. The complaint, issued on January 31, 2008, stems from unfair labor practice (ULP) charges that International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) filed against Ivyport Logistical Services, Inc. (Respondent or the Company), and alleges violations of Sections 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

Pursuant to notice, I conducted a trial in San Juan, Puerto Rico, on June 18–19, 2008, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel filed a helpful posthearing brief that I have duly considered.

Issues

1. Did Respondent, on about May 10, 2007,[1] change employees' payday from Thursday to Friday without affording the Union prior notice and an opportunity to bargain?

2. Did Respondent, on about October 25, change the hour that employee would receive their paycheck to "after 5:00 p.m," without affording the Union prior notice and an opportunity to bargain?

3. Did Respondent violate the Act by terminating Edwin Rodriguez and Concepcion Rosario on November 2 because they participated in, and led, an employees' work stoppage on October 26 in response to Respondent's conduct described in the preceding paragraph?

[1] All dates hereinafter occurred in 2007 unless otherwise indicated.

Witnesses and Credibility

The General Counsel called Rodriguez and Rosario, as well as Union Representative Jose Rodriguez Baez (Baez).

Respondent called Operations Manager Jose Luis Baez (Manager Baez) and Vice-President Marie Angie Navas.

Thus, all witnesses had a stake in the proceeding as either agents of the parties or as alleged discriminatees. In any event, on salient facts, witnesses were generally consistent, with normal and natural variations in recall. No witnesses on either side testified identically on all events, leading to the conclusion that they testified from genuine recollection rather than script. In finding what was said in relevant conversations, I have considered the various accounts and the record as a whole in determining what is most plausible.

Facts

Based on the entire record, including witness testimony, documents, and the parties' stipulations, I find the following facts.

Respondent, classified as a ground-handling company in the airline industry, provides ramp, ticketing, warehousing, and related services to airlines at the International Airport in Carolina, Puerto Rico (the airport). Jurisdiction has been admitted, and I so find. Union-represented employees work at a building located in the airport's cargo area (the facility). The first floor has counters in the front and a warehouse in the back, with offices located upstairs.

Pursuant to an election held on October 10, 2006, in Case 24–RC–8536, the Union was certified on January 4 as the exclusive collective-bargaining representative of the facility's full-time and regular part-time maintenance and service employees, including warehouse employees, mechanics, ramp employees, ramp agents, cleaners, passenger agents, and make-up employees (Unit A). Rodriguez, who was in the unit, served as one of the Union's two observers at the election. Approximately 60 employees are in this unit.

On the same date, Respondent recognized the Union as the exclusive collective-bargaining representative of the facility's full-time and regular part-time warehouse counter agents (Unit B). Rosario was in this unit, which has about 80 employees.

Respondent and the Union have held negotiations for an initial collective-bargaining agreement that would cover both units.[2] Rodriguez and Rosario were among the six employees on the Union's negotiating team, and both attended numerous sessions up to October.

Change in Paydays in May

Respondent's "Rulebook and Corporate Policy," in effect since before 2007, provides that employees be paid on Thursdays every 2 weeks, with the time of payment regularly at 11:30 a.m., "with some exceptions."[3]

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[2] Hereinafter, I will use "unit" to cover both Unit A and Unit B, since any distinctions between them are immaterial for purposes of this decision.

[3] GC Exh. 6. All of Respondent's documents that are exhibits are in Spanish, with English translations included.

Consistent with this provision, Respondent and the Union negotiated an agreement that employees would receive their paychecks every other Thursday. This was embodied in a memorandum entitled "Payroll Calendar 2007," dated January 12, from the human resources department (HR) to all personnel.[4] For example, employees would be paid on Thursday, October 25, for work performed during the 2-week period from October 1–14. The General Counsel does not contend that the parties ever negotiated, or even discussed, the topic of the time of day of payment.

Beginning In May, unit employees received paychecks on a Friday, rather than the scheduled day of Thursday, and they complained to Baez in June or July. The Union had received no prior notice of this change, and Baez raised the matter with Alfonso Fernandez, Respondent's president, and Respondent's attorney at the time. There is no evidence, nor does Respondent aver, that the Union ever acquiesced in the change. In the summer, Respondent reverted to providing paychecks on Thursdays.

In 2006, paychecks were delivered to employees between 11 a.m. and 1 p.m. In 2007, prior to October, Respondent usually provided them during such timeframe, but on several paydays, employees received them at 3 p.m.[5]

Events of October 25 – 26

On the late afternoon of October 25, Respondent posted a memorandum of that date on the door leading to the warehouse.[6] From HR to all personnel, and entitled "New checks," it stated that "payroll checks that will be delivered on Friday 26 [sic] of 2007 will be ready to be picked up after 5:00 p.m." The second paragraph explained that there was a delay in the delivery of new checks from the printing store.

Rodriguez arrived at 6 a.m. on October 26, saw the above memorandum, and punched in. He talked with several cargo agents, who complained that they effectively would not be paid until Saturday. At around 6:30 a.m., they decided not to work until they were able to speak with management; essentially, to engage in a work stoppage. Rodriguez and others then called employees from other areas to get together for that purpose.

Rosario came to work as scheduled at 9 a.m. and punched in. He saw that other employees were not working and asked Rodriguez what was going on. The latter replied that they did not want to start working until resolution of the paycheck issue.

At about 9 a.m., Rodriguez called Baez and stated that employees were not going to be paid until after 5 p.m. and had decided to stop working until they were paid, because this had had happened before, and the problem was really an abuse. Rodriguez further said that employees had gathered in the warehouse area. Baez responded that he would come by.[7] This was the first notice the Union received of the late distribution of paychecks on October 26.

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[4] GC Exh. 2.

[5] Credited and uncontradicted testimony of Rosario at Tr. 27.

[6] GC Exh. 3.

[7] Both Baez and Rodriguez testified about this phone call. Rosario testified that he also spoke with Baez by telephone that morning, but the latter did not testify about any such conversation. Regardless, Baez received notice of the work stoppage after it began.

At about that same time, a representative of Martinair, Respondent's top customer, called Manager Baez and stated that no one was receiving or assisting with their cargo at the warehouse. Manager Baez replied that he would be at the facility in about 10 minutes and would call him back.

Manager Baez called Rodriguez at between 9 and 9:30 a.m. and asked what was going on, stating that a Martinair slide had to go out. Rodriguez responded that no one wanted to work until there was a dialogue about the paychecks. Manager Baez replied that he was coming to the facility. After that, he notified Navas of what was occurring.

Navas then called Baez. She asked if he was aware that the employees had stopped working, and he replied yes.[8] She responded that the Company was not providing service to Martinair, and this was intolerable. She asked him to please go speak with the employees. He told her that he was en route to the facility.

Manager Baez arrived at approximately 9:30 a.m. He first talked with Rodriguez in front of the warehouse and asked him to speak to the employees and try to get the Martinair slide out. Rodriguez replied that the employees were firm in their decision. The two went inside, where about 25 employees were gathered. Manager Baez went to the Iberia counter. He asked the employees to get the slide out for Martinair, not for the Company but for him, if not for themselves, because they could lose Martinair as a customer. Manager Baez testified that Rodriguez and Rosario were the "spokespeople" for the group.[9] They told him that employees were not working because of the delay in payment.

Baez arrived shortly afterward, and he, Rodriguez and Rosario spoke with Manager Baez. Manager Baez explained that Respondent had run out of printed checks and had ordered them, that they were on their way via express mail but would not arrive until late in the day. Rosario suggested provisional checks, and Baez payment in cash. Manager Baez said that he already had inquired about getting provisional checks, but they were too costly; as to cash payment, he would have to speak with Navas.

Manager Baez and Baez went upstairs and called Navas on a speaker phone. She said that the payroll was substantial, and paying in cash would be very difficult. Further, because of a shortage in administrative staffing, doing the checks manually was infeasible. She asked Baez to please try to get employees to go back to work. She also stated that if employees were so dissatisfied, they should go home and come back at 5 p.m. for their paychecks.

At about 11:15 a.m., Baez related to employees the above conversation with Navas and said that although he thought Respondent was making excuses, it was their choice whether they wanted to continue the stoppage or return to work.

Rodriguez, Rosario, and the other employees engaged in the work stoppage went back to work at about noon. Employees received their paychecks at about 4:15 p.m. that day.[10]

The General Counsel has not contended that late payments of checks recurred after October 26.

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[8] Based on Baez's credited testimony, which I find more plausible than Nava's testimony that he said he was not aware of what was happening.

[9] Tr. 178; see also Tr. 217–218.

[10] Credited and unrebutted testimony of Navas at Tr. 264 – 265.

Terminations of Rodriguez and Rosario

Rodriguez and Rosario reported to work as scheduled on the days after October 26. On November 2, both were terminated, separately. They received identical termination letters, stating that they were discharged because "[o]n October 26. 2007 you refused to perform your duties together with other employees in the Ivyport Warehouse without justified cause. Based on your action, the company's operations were seriously affected to the extent that the corresponding services were not offered to the clientele."[11] The letters made reference to the problems their actions created in terms of Respondent's relationship with one of its most important clients (Martinair).

After Rosario was notified of his discharge, he located Navas, and in effect asked her to reconsider his termination. She told him that he was a good employee but could no longer work there because he had been a leader in the work stoppage.

Navas testified that management made the decision to terminate them based not only on their refusal to perform their own duties but also on their not having allowed other employees to perform.

Conclusions

Change in Paydays in May

Paydays are a mandatory subject of bargaining, and a union representing employees is entitled to notice and an opportunity to bargain over any changes therein. *Abernathy Excavating, Inc.*, 313 NLRB 68 at fn. 1 (1993); *American Ambulance*, 255 NLRB 417, 421 (981), enfd. 692 F.2d 762 (9th Cir. 1982). Here, there was a negotiated agreement embodying prior practice that employees be paid on a Thursday. Starting in May, Respondent did not consistently adhere to that practice, several times paying employees on a Friday. Although exigent circumstances might have justified Respondent's delay in the payday to Friday, October 26, Respondent offered no explanation of why it had earlier paid employees on Fridays instead of Thursdays. When the Union became aware of the change in June or July, Baez raised the subject to management and did not acquiesce.

As reflected by the unfortunate events of October 26, delaying payment until Friday had a potentially prejudicial impact on employees. Therefore, I conclude that by giving employees their paychecks on Friday on a number of paydays starting in May, without affording the Union notice and an opportunity to bargain, Respondent made a unilateral change in working conditions in violation of Section 8(a)(5) and (1).

Change in Time of Pay on October 26

The fundamental question here is whether, in fact, a change in the time of pay occurred. Although Respondent's rulebook provided that employees be paid at 11:30 a.m., there was the caveat, "with some exceptions." On several occasions in 2007 prior to October, Respondent distributed paychecks at 3 p.m. On October 26, they were given to employees at approximately 4:15 p.m. Clearly, the delay in paycheck issuance resulted, at least in part, from circumstances outside of Respondent's control. The General Counsel does not take the position that on any

[11] GC Exhs. 4 & 5.

other paydays, the time that employees were paid amounted to a unilateral change in working conditions. In my view, this 1-1/4 hour delay on a single occasion, resulting from exigent circumstances, did not rise to the level of a unilateral change. A unilateral change in a mandatory subject of bargaining is unlawful only if is "material, substantial, and significant." *Flambeau Airmold Corp.*, 334 NLRB No. 16, slip op. at 2 (2001), modified on other grounds, 337 NLRB 1025 (2002), citing *Alamo Cement Co.*, 281 NLRB 737, 738 (1986); see also *United Rentals, Inc.*, 350 NLRB No. 76, slip op 7 fn. 6 (2007).

Even assuming a unilateral change in the time of paycheck distribution, it became an issue only because of the change in the day of pay. Thus, had the payday been Thursday, October 25, and employees received their checks after 5 p.m., they still could have deposited them before the banks closed on Friday. Accordingly, I conclude that the time issue in question was essentially subsumed by the change in the day of pay from Thursday to Friday, which I have already found to be a violation.

For the above reasons, I will not find this a separate violation of Section 8(a)(5) and (1).

The Terminations of Rodriguez and Rosario

The framework for analyzing alleged violations of Section 8(a)(3) or protected concerted activity under Section 8(a)(1) is *Wright Line* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

Under *Wright Line*, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of such activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399−403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Serrano Painting*, 332 NLRB 1363, 1366 (2000); *Best Plumbing Supply*, 310 NLRB 143 (1993). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting*, supra at 1366, citing *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

Protected Concerted Activity

Respondent's management knew that Rodriguez and Rosario were active participants in the work stoppage on October 26 and, indeed, considered them its leaders. Respondent has always taken the position that their terminations were based solely on that conduct, which justified their discharges.

The key issue is therefore whether their activities were protected. If not, Respondent prevails. On the other hand, if they are found to have been protected, Respondent by its own stated defenses, violated the Act under a *Wright Line* analysis.

Whether the employees, including Rodriguez and Rosario, acted wisely in choosing to engage in a work stoppage over the announced delay in receipt of their paychecks is not for me to determine. Rather, the reasonableness of their decision is irrelevant to the issue of whether their activity was protected in nature. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16 at fn. 12 (1962), citing *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344 (1938). The answer to this is clearly yes. As the Board stated in *Rogers Environmental Contractors, Inc.*, 325 NLRB 144, 145 (1997), citing *Cal-Walts, Inc.*, 258 NLRB 974, 979 (1981):

> [T]here can be no doubt that there is no more vital term and condition of employment than one's wages, and employee complaints in this regard clearly constitute protected activity.

Thus, in a case with facts very similar to these, *Downtowner Motor Inn*, 262 NLRB 1058 (1982), a work stoppage stemming from an employer's announced 1-day delay in issuance of paychecks was found to be protected activity. Cf. *Rogers Envrionmental Contractors*, supra.

The burden is on the employer to show that the work stoppage is either unprotected or, because of the employees' conduct, has lost protected status. *Swope Ridge Geriatric Center,* 350 NLRB No. 9 at fn. 3 (2007); *Silver State Disposal Service*, 326 NLRB 84, 85 (1998). Respondent has not alleged any action, such as violence, that would remove the conduct from the ambit of the Act's protection. See, e.g., *Staten Island University Hospital*, 339 NLRB 1059 (2003).

Accordingly, I conclude that Rodriguez and Rosario engaged in protected activity when they participated in, and led, a work stoppage on October 26 in protest of Respondent's delay in providing employees with their paychecks. It follows that their terminations violated Section 8(a)(1) of the Act.

Union Activity

I do not conclude that their conduct constituted union activity. Employees sua sponte decided to engage in a work stoppage prior to any notification to the Union. Although Baez did come to the facility and had conversations with management, he never raised the objection that Respondent's conduct violated any agreements with the Union and never indicated that the Union considered the matter to come under the penumbra of management-union relations. In these circumstances, the work stoppage neither started as a union-sponsored activity nor was later converted to such.

Nor is there any evidence of animus toward Rodriguez and Rosario because of their participation as members of the Union's negotiating committee or on account of their other union activities. The timing of the terminations, the termination letters, and the testimony of witnesses all lead to the conclusion that Respondent discharged them only for their activities on October 26, and not for any other reasons.

Therefore, I conclude that by terminating Rodriguez and Rosario because of their conduct during the work stoppage on October 26, Respondent violated Section 8(a)(1), but not Section 8(a)(3), of the Act. In any event, finding a violation of the latter would make no difference in the remedy I will order. See *Industrial Hard Chrome, Ltd.*, 352 NLRB No. 47 at fn. 2 (2008).

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By terminating Edwin Rodriguez and Concepcion Rosario, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

4. By changing the payday from Thursday to Friday without affording the Union notice and an opportunity to bargain, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act.

Remedy

Because I have found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Since Respondent terminated Edwin Rodriguez and Concepcion Rosario in violation of Section 8(a)(1), it must offer them reinstatement and make them whole for any loss of earnings and other benefits in accordance with *Ogle Protective Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I deny the General Counsel's request for compound interest, based on the Board's decision in *National Fabco Mfg.*, 352 NLRB No. 37 slip op. at 3 fn. 4 (2008).

To ensure that all employees can understand the notice to employees, Respondent shall be directed to post it in both English and Spanish.

ORDER

The Respondent, Ivyport Logistical Services, Inc., Carolina, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating or otherwise disciplining employees because they participate in, or lead, a work stoppage due to Respondent's delay in distributing paychecks, or otherwise engage in protected concerted activities.

(b) Changing the day of the week employees are paid, without first affording International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) notice and an opportunity to bargain.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Edwin Rodriguez and Concepcion Rosario full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make employees Edwin Rodriguez and Concepcion Rosario whole for any loss of earnings and other benefits they suffered as a result of their unlawful terminations, in the manner set forth in the remedy section of the decision.

(c) Within 14 days of the Board's Order, remove from its files any references to the November 2, 2007, terminations of Edwin Rodriguez and Concepcion Rosario, and within 3 days thereafter, notify them in writing that this has been done and that the terminations will not be used in any way against them.

(d) Adhere to the practice, as contained in Respondent's agreement with the Union, to pay employees on Thursdays.

(e) Within 14 days after service by the Region, post at its facility at Carolina, Puerto Rico, copies of the attached notice marked "Appendix A"[12] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 24 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2007.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 24 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 28, 2008.

_____
Ira Sandron
Administrative Law Judge

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT terminate or otherwise take disciplinary action against you because you participate in, or lead, a work stoppage in response to our delay in distributing to you your paychecks, or engage together in any other protected activities.

WE WILL NOT change from Thursday to Friday the day of the week you receive your paychecks, without first affording International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) notice and an opportunity to bargain over the change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act, as set forth at the top of this notice.

WE WILL make Edwin Rodriguez and Concepcion Rosario whole for any loss of pay or other benefits suffered as a result of our discrimination against them.

WE WILL within 14 days from the date of this Order, offer full reinstatement to Edwin Rodriguez and Concepcion Rosario to their former positions of employment, or if such positions are no longer available, to substantially equivalent positions, without prejudice to any seniority or other rights and privileges they previously enjoyed.

WE WILL remove from our files any reference to the unlawful terminations of Edwin Rodriguez and Concepcion Rosario, and within 3 days thereafter notify them in writing that this has been done and that the terminations will not be used against them in any way.

WE WILL restore the practice, as contained in our agreement with the Union, to pay you on Thursdays.

IVYPORT LOGISTICAL SERVICES, INC.

_____

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

525 F. D. Roosevelt Avenue, La Torre de Plaza, Suite 1002

San Juan, Puerto Rico 00918-1002

Hours: 8:30 a.m. to 5 p.m.

787-766-5347

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 787-766-5377.